

REMARKS

Reconsideration and allowance of the above identified application are requested.

Information Disclosure Statement

The attached IDS includes documents cited in this response to the Office action dated October 29, 2004. A check that includes the fee for submitting the IDS after the first Office action is enclosed.

Claim Objection.

Claims 4-6 were objected to for informalities because the first word of each claim was not capitalized. Applicant amends only Claim 6 accordingly, because Claims 4 and 5 are cancelled. In addition, the Applicant amends all claims where capitalization is appropriate, including Claims 1-2, 7-8, and 10.

35 U.S.C. § 112 Claim Rejection.

Claims 3-5 were rejected under 35 U.S.C. 112, second paragraph, as being indefinite because similar claim ranges applied to overlapping sauce types as recited in the claim preambles. Applicant amends the claims to eliminate this indefiniteness by replacing Claims 3-5, which are cancelled, with two new claims, Claims 11-12. Dependent Claim 11, which depends from Claim 1, limits the claimed sauces to "creamy sauces." Claim 12 further limits the claimed invention to creamy sauces that contain cheese. Because a sauce with cheese would include alfredo sauce as noted by the Examiner, a claim directed specifically to alfredo sauce has been eliminated.

Although not specifically rejected by the Examiner, the Applicant believes Claims 7-9 would be indefinite for similar reasons, and accordingly Claims 7-8 have been amended and Claim 9 has been cancelled.

Specification.

The paragraph that starts on page 2, line 29 is amended to clarify the claimed invention within the scope of the original application. The Applicant's invention claims sauces made with an emulsified liquid shortening composition comprising dietary fiber gel. The dietary fiber gel

of the invention is disclosed by Inglett (U.S. Patent, Number 5,766,622, dated June 16, 1998), which was incorporated by reference into the original as-filed application at page 2, line 32. Information included by reference is “as much a part of the application as filed . . . , and should be treated as part of the text of the application as filed.” MPEP § 2163.07(h). Clearly, dietary fiber gel as disclosed by Inglett is part of the as-filed application.

Inglett teaches at Col. 1, lines 9-12, that it is well known that “[d]ietary fibers are generally considered to be the soluble and insoluble components of cell walls . . . [and] consist primarily of cellulose, hemicellulose,” and so forth. In the process of the invention, Inglett at Col. 3, lines 24-32, explicitly teaches that “[f]ollowing at least the second stage of treatment . . . the solids are separated for the liquids and the recovered insolubles are carried forward to the next processing step, [wherein] the second stage separation is intended to isolate and recover the gel product of this invention,” i.e., dietary fiber gel. The source of the dietary fiber is agricultural by-products such as grain seed brans, hulls, and so forth is noted by Inglett at Col. 3, lines 3-8.

Inglett implicitly teaches that dietary fiber gel is insoluble dietary fiber derived from the alkaline treatment of agricultural by-products. Inglett at Col. 3, line 33 to Col. 4, line 36 teaches the first stage of treatment is “preferably in the range of about . . . pH 9-13. The gel products . . . contained in the insoluble fraction . . . from the first stage . . . are subjected to [a] second stage . . . [of] treatment . . . at alkali pHs, preferably in the range of 7-12. Following the second stage . . . solids are again separated from the liquids . . . [and] the recovered solids consist of cellular debris in the form of a hydrated gel. The gel may be dried.” One skilled in the art would know that solids separated from liquid after the second stage are implicitly insoluble dietary fiber. Clearly, because Inglett explicitly and implicitly teaches dietary fiber gel as the insoluble component of dietary fiber that can be recovered and formed into a gel, so does the as-filed application.

As to the physical form of the dietary fiber gel, Inglett at Col. 5, lines 43-45, explicitly teaches that dietary fiber gel “may exist in either the hydrated form as gels or in the dehydrated form as flakes or powder.”

Inglett inherently teaches an amorphous dietary fiber gel because the gel exhibits a smooth morphology. For example, at Col. 4, line 63 to Col. 5, line 3, Inglett teaches that dietary fiber gel has “a smooth sheet- or film-like morphology” based on scanning electron photographs

at magnifications of 500-1000X, and “[t]he smoothness of the original gels are restored after reconstitution of the dried products.” Typically, crystal structures are characterized by sharp edges that result in rough, jagged, and under scanning electron microscopic magnification a generally non-smooth morphology such that one skilled in the art would know that dietary fiber gel that has a smooth morphology would be inherently amorphous.

Thus, dietary fiber gel in the Applicant’s invention comprises non-particulate amorphous insoluble dietary fiber derived from the alkaline treatment of agricultural by-products. Although the specification has been amended so as to more reasonably convey the invention, and more specifically what dietary fiber gel is to one skilled in the art, the amendments to the specification are expressly, implicitly, or inherently supported by the Inglett patent, a part of the original as-filed application.

35 U.S.C. § 102 Claim Rejection.

The Applicants traverse the rejection of Claims 1-10, as amended, as anticipated under 35 U.S.C. § 102 (b) because the McGinley reference cited in the Examiner’s Office Action teaches fat substitutes comprising coated microcrystalline cellulose and water. The coated microcrystalline cellulose includes at least two components, an inner core of microcrystalline cellulose and a coating of galactomannan gum. Optionally, addition components such as flavor enhancing lipids can coat the microcrystalline cellulose core. The Applicant’s invention on the other hand discloses a fat substitute for use in making sauces that comprises non-coated, amorphous dietary fiber gel, water and a lipid, wherein the lipid is the fat and oil component of the shortening.

There is nothing disclosed in McGinley that anticipates the Applicants’ invention as suggested by the Examiner. Anticipation depends upon prior publication of the invention. 35 U.S.C. § 102(b). The establishment of anticipation requires that every element and limitation of the claimed invention can be found in a single prior publication. *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631 (Fed. Cir. 1987). The Applicants traverse the rejection because nothing in McGinley teaches all the elements and limitations of the Applicants’ claimed invention.

McGinley teaches a fat substitute comprising an aggregate and water. The aggregate is a coated microcrystalline cellulose spheroid particle wherein an outer surface of the particle is

coated with a gum. Optionally, the aggregate can be further covered with a flavor enhancing lipid. Although the Examiner implied that aggregate in McGinley is the same material as dietary fiber gel, the aggregate in McGinley is in fact a different compound than dietary fiber gel.

McGinley does teach certain foods that comprise a fat substitute comprising coated microcrystalline cellulose and water, and although implied, McGinley does not explicitly teach sauces. The applicant's invention on the other hand teaches sauces comprising emulsified liquid shortening. The emulsified liquid shortening, a fat substitute, comprises non-coated amorphous dietary fiber, water, and lipid, wherein the lipid is the fat and oil component of the shortening. Nothing in the cited prior art reference teaches the claimed invention, sauces comprising emulsified liquid shortening comprising non-coated amorphous dietary fiber gel, water, and lipid, wherein the lipid is the fat and oil component of the shortening.

For example, at Col. 1, lines 19-22, McGinley teaches a fat substitute that "relates to a substantially spheroidal shaped particulate aggregate of microcrystalline cellulose (MCC) and a galactomnannan gum (GG) . . . which has a fat-like consistency, appearance and mouth feel when reconstituted in food." McGinley specifically defines aggregate at Col. 1, lines 31-35, as "a stable, substantially physical mixture of two or more components in its wet or dry state but which is more firmly bound when dried, yet remains intact if reconstituted in water under typical food processing conditions." McGinley further teaches at Col. 5, lines 20-26, that aggregate stability is achieved when the gum in the aggregate composition is present "in an amount sufficient to cover and form a stable aggregate with the MCC and thus provide sufficient cover of the MCC particles to mask the characteristic taste of the cellulose." At Col. 5, lines 32-33, McGinley further notes that particulate aggregates are produced such that "the gum covers, i.e., is absorbed on, the cellulose." Optionally as taught by McGinley at Col. 6, lines 45-61, a third component can be added to the aggregate "to impart additional properties" to the aggregate, such as "for the purpose of modifying the surface characteristics of the MCC-GG aggregate by creating the flavor and taste sensation of fat." The coated microcrystalline cellulose is dispersed in water to form a fat substitute as disclosed by McGinley at Col. 7 line 57 to Col. 8 line 20. At Col. 8, lines 21-25, McGinley teaches the fat substitute can be used in "other foodstuffs." Thus, McGinley teaches generally "other foodstuffs" comprising a fat substitute comprising coated microcrystalline cellulose, and water, wherein the coated microcrystalline cellulose can optionally further comprise a flavor enhancing lipid, but does not teach sauces comprising

emulsified liquid shortening comprising non-coated dietary fiber gel, water and lipid, wherein the lipid is the fat and oil component of the liquid shortening.

Finally, McGinley teaches generally "other foodstuffs" comprising a coated microcrystalline cellulose fat substitute, while this application, Application No. 10/689,195, is directed towards the specific use of emulsified liquid shortenings in sauces. Although McGinley's invention for "other foodstuffs" may anticipate a genus of food products that comprise a fat substitute comprising coated microcrystalline cellulose, nothing in McGinley specifically teaches a separate and distinct food specie of sauces that are formulated with an emulsified liquid shortening comprising dietary fiber gel, water, and lipid.

Nonstatutory Double Patenting Rejection.

The Applicant traverses the provisional rejection of Claims 1-10, as amended, as obviousness-type double patenting based on a judicially created doctrine because the references, Application No. 10/689,274 teaches soups comprising emulsified liquid shortening. The Applicant's invention on the other hand teaches the patentably distinct species of sauces comprising emulsified liquid shortening.

The References Do Not Teach the Claimed Invention

There is nothing disclosed in the copending Application No. 10/689,274 for soups that teaches the modification of the references suggested by the Examiner. Obviousness, including obviousness-type double patenting, depends on the differences between a claimed invention and the prior art. *See generally, 35 U.S.C. § 103(a)*. The establishment of obviousness requires that the prior art must teach or suggest all the limitations of the claimed invention. *See also, In re Royka*, 490 F.2d 981, 984-85 (CCPA 1974). The Applicant traverses the rejection because nothing in Application No. 10/689,274 teaches all the elements and limitations of the Applicant's claimed invention.

The current application, Application No. 10/689,195, teaches sauces, including sauce mixes, comprising emulsified liquid shortening that contains dietary fiber gel such that the solids within the dietary fiber gel represent 0.5 percent to 7.0 percent of the overall sauce formulation. The cited copending application, Application No. 10/689,274, teaches soups, including soup mixes, comprising emulsified liquid shortening that contains dietary fiber gel such that the solids

within the dietary fiber gel represent 0.25 percent to 5.0 percent of the overall soups formulation. The inventions are patentably distinct because soups are liquid foods while sauces are food flavorings.

For example, a dictionary definition of sauce is “a flavoring liquid for food[, such as] a thick liquid served with food to add extra flavor,” while a dictionary definition of soup is “a liquid food made by cooking meat, fish, vegetables, and other ingredients in water, milk, or stock.” In order for sauces to add extra flavor to food, one skilled in the art would know that sauces generally have a characteristic of a thick substance that can adhere or cling to food. On the other hand, soup is a liquid food that has no particular characteristic to adhere or cling to food so as to add extra flavor. Clearly, one skilled in the art would know the sauces and soups are patentably distinct because soups are a liquid food without the specific characteristic to adhere or cling to food to add flavor.

In addition, neither copending application disclose, describe, or claim soups and sauces together as related food groups so as to be patentably indistinct. Also, the Examiner offered no specific evidence that sauces and soups are patentably indistinct.

Although the claimed invention in co-pending application, Application No. 10/689,274, for soups has elements that are similar to the elements in the current application, Application No. 10/689,195 for sauces, all the limitations or elements of the current inventions are not taught because the ranges of the similar elements are not identical, and because the subject matter as given in the preamble of the claims are directed to patentably distinct inventions. Clearly, Application No. 10/689,274 teaches soups having a certain range of dietary fiber gel, and does not teach sauces as in Application No. 10/689,195 having a substantially different range of dietary fiber gel.

The References Lack Any Suggestion to Combine

There is nothing disclosed in copending Application No. 10/689,274 for soups that teaches the modification of the references suggested by the Examiner. Obviousness requires that the suggestion to make the claimed invention must found in the prior art. *See generally, In re Vaeck*, 947 F.2d 488, 493 (Fed. Cir. 1991). Such a suggestion is lacking in the cited references. Even if the references fully taught the Applicant's invention, the Applicant traverses the rejection

because nothing in copending Application No. 10/689,274 affirmatively suggests making the cited combination.

Copending Application No. 10/689,274 teaches soups, including soup mixes, comprising emulsified liquid shortening that contains dietary fiber gel. The Applicant's current invention, Application No. 10/689,195, on the other hand teaches sauces comprising an emulsified liquid shortening comprising dietary fiber gel. Nothing in Application No. 10/689,274 teaches or suggests sauces comprising emulsified liquid shortening that contain dietary fiber gel.

More specifically, copending Application No. 10/689,274 teaches the food product specie of soups that comprise emulsified liquid shortening, a fat substitute that comprises dietary fiber gel, water, and lipid. Application No. 10/689,274 does not teach or suggest any other food product species formulations that use an emulsified liquid shortening comprising dietary fiber gel, water, and lipid.

Combining the References Lacks a Reasonable Expectation of Success

There is nothing disclosed in copending Application No. 10/689,274 that teaches a reasonable expectation of success in combining the references as suggested by the Examiner. Obviousness exists when the references provide a reasonable expectation of success for the proposed combination. *See generally, In re Merck & Co., Inc.*, 800 F.2d 1091, 1097-98 (Fed. Cir. 1986). Whether the combination is obvious or unobvious requires consideration of all the evidence and resultant findings. *See also, In re Rinehart.*, 531 F.2d 1048, 1052 (CCPA 1976). Such an expectation of success is lacking in the cited reference. Even if the references fully taught the Applicants invention, the Applicant traverses the rejection because nothing in copending Application No. 10/689,274 for soups leads to an expectation of success for the identified combination.

For example, based on common dictionary definitions of soup and sauce, copending application, Application No. 10/689,274, teaches soups that are liquid foods, while the Applicant's current application 10/689,195, teaches sauces that generally add flavor to food by having a characteristic that allows the sauce adhere or cling to the food. One skilled in the art would know that a sauce that clings to food is not a liquid food product such as soups. Nothing in the cited reference teaches any expectation that a component such as emulsified liquid shortening that is used to make a flavor adding food product that clings to other foods, such as

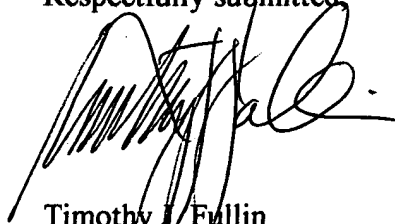
saucers, can also be use to make liquid foods, such as soups. For example, there is no explicit mention of saucers in Application No. 10/689,274.

Further, the range of dietary fiber gel in saucers and soups as taught in Application No. 10/689,195 and 10/689,274, respectively, are distinctly different. For example, saucers, including sauce mixes, comprise emulsified liquid shortening that contains dietary fiber gel such that the solids within the dietary fiber gel represent 0.5 percent to 7.0 percent of the overall sauce formulation. On the other hand soups, including soup mixes, comprise emulsified liquid shortening that contains dietary fiber gel such that the solids within the dietary fiber gel represent 0.25 percent to 5.0 percent of the overall soups formulation. The range of dietary fiber gel solids for saucers is substantially broader that the range for soups and Application No. 10/689,274 for soups does not teach any expectation of success for a broader range. Clearly, Application No. 10/689,274 does not teach any expectation that emulsified liquid shortening used for soups can be used for saucers. Nothing in Application No. 10/689,274 for soups provides any expectation that a separate and distinct food product species, such as saucers, can be successfully formulated with an emulsified liquid shortening comprising dietary fiber gel, water, and lipid.

Applicant has amended the specification to clarify the foregoing distinctions. In addition, the Applicant has amended the claims to remove any inadvertent claim indefiniteness. In view of the amendments, and above arguments, Applicant respectfully requests that the rejections of Claims 1-10, as amended, as being obvious under 35 U.S.C. § 103 (a) and the rejection of Claims 3-5, as amended, as being indefinite under 35 U.S.C. § 112 be withdrawn. Further, in view of the amendments, and above arguments, Applicant respectfully requests that the provisional rejections of Claims 1-10 under nonstatutory obviousness-type double patenting based on a judicially created doctrine be withdrawn.

Applicant believes that the amended patent application is now in condition for allowance. Accordingly, the Applicant respectfully requests that a Notice of Allowance be issued in this case. The Examiner is invited to contact the undersigned by telephone or facsimile if the Examiner believes this would advance the prosecution of the matter.

Respectfully submitted

A handwritten signature in black ink, appearing to read 'Timothy J. Fullin', written over a horizontal line.

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January 28, 2005
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